

BL07H



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aspen Cleaning Corporation
File: B-233983
Date: March 21, 1989

DIGEST

Protest that bonding requirement in an invitation for bids for custodial services is unduly restrictive of competition is without merit since it is within agency's discretion to require bonding even in a small business set-aside and the General Accounting Office will not upset such a determination made reasonably and in good faith. Agency's requirement for uninterrupted performance of custodial services is itself a reasonable basis for imposing bonding requirements in a solicitation where the agency has had prior experience indicating this may be a problem.

DECISION

Aspen Cleaning Corporation protests the bid and performance bond requirements in invitation for bids (IFB) No. GS-03P-87-DWC-0014, issued by the General Services Administration (GSA) for custodial and related services at the Federal Building in Norfolk, Virginia. The building accommodates approximately 600 federal employees plus visitors.

We deny the protest.

The solicitation contains requirements for a bid guarantee and a performance bond, each in an amount equal to 20 percent of the annual bid price for the initial 12-month period of performance. Aspen contends that these requirements in this small business set-aside unduly restrict competition since the additional expense of obtaining the bonds prevents small to middle size companies from bidding on the contract.

In response, the GSA notes that Federal Acquisition Regulation (FAR) § 28.103-2(a) permits agencies to require performance bonds when necessary to protect the government's

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interests. The agency states it recognizes the financial impact on small business concerns of the bonding requirements, and for that reason set them here at the minimum allowable percentage under FAR § 28.101-2. Nevertheless, the agency maintains that some bonding protection was appropriate.

Specifically, the contracting officer determined that an unacceptable or late performance by a janitorial contractor providing services would directly impair the building occupants' productivity, and he observes that bonding requirements provide an incentive for contractors not to abandon performance. In addition, he states that it has been the agency's experience with service contracts that bonding requirements were in the government's best interest because, in the worst cases when a contractor has defaulted, the government has had the benefit of the availability of a bonding company to complete the contract to insure continuous service. The contracting officer also notes that his determination was made in accordance with General Services Administration Regulation (GSAR) §§ 528.101-3(b) and 528.103-2 which mandate that where bonding is required the contracting officer make the determination in writing and obtain approval from higher authority. The agency finally notes that the imposition of the bonding requirements has not impaired competition in past procurements of this type and that competition can be expected in the future.

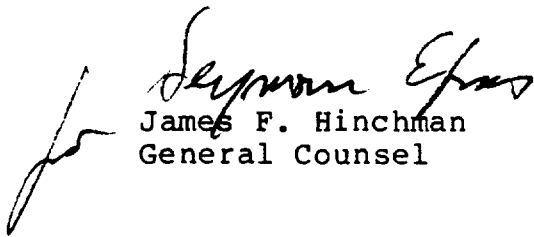
We have consistently held that while a bond requirement may, in some circumstances, result in a restriction of competition, it may nevertheless be a necessary and proper means of securing to the government fulfillment of the contractor's obligation under the contract in appropriate circumstances. PBSI Corp., B-227897, Oct. 5, 1987, 87-2 CPD ¶ 333. Although, as a general rule, in the case of nonconstruction contracts, agencies are admonished against the use of bonding requirements, FAR § 28.103-1(a), the use of bonding requirements is permissible where the bonds are needed to protect the government's interest, regardless of whether the agency's rationale comes within the four reasons for a performance bond articulated in FAR § 28.103-2(a). PBSI Corp., B-227897, supra.

In reviewing a challenge to the imposition of a bonding requirement we look to see if the requirement is reasonable and imposed in good faith; the protester bears the burden of establishing unreasonableness or bad faith. Moreover, we have previously held that a finding on the part of the agency that continuous operations are absolutely necessary is itself a sufficient basis for requiring a performance

bond. PBSI Corp., B-227897, supra. In addition, we have sanctioned the imposition of bonding requirements in small business set-asides. Id.

In view of the GSA's prior experience, the consequences of default by a janitorial service contractor, and the GSA's statement, which has not been rebutted by the protester, that the bonding requirement has been used in the past with no evidence of diminished competition, we are unable to conclude that the GSA's requirement for bonds is unreasonable. In addition, Aspen has failed to show that bad faith motivated the contracting officer's decision.

The protest is denied.



James F. Hinchman
General Counsel